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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

The STATE OF WYOMING,

Petitioner,

v.

SANDRA HOUGHTON

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Wyoming

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS IN SUPPORT OF PETITIONER

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A. Because of the diminished expectation of privacy that occupants of a motor vehicle possess, it is not unreasonable to search personal property left in the vehicle by either the driver or a passenger, during a lawful search. It is well settled that once a law enforcement officer has probable cause to search an automobile, he or she can search all containers within the passenger compartment. 8

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II. As an alternative ground, the Court should uphold the search of the Respondent's purse, as a search of a vehicular passenger compartment incident to an arrest, where there was probable cause to arrest the driver of this vehicle for possession of controlled substances. The crucial element conferring upon law enforcement officers the right to conduct a search incident to an arrest is probable cause to arrest, not the actual arrest itself which may occur after the search. 21

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae National Association of Police Organizations, Inc. (hereafter "NAPO"), submits this brief in support of the Petitioner, the State of Wyoming, for the reversal of the judgment of the Supreme Court of the State of Wyoming, which had reversed the trial court's denial of Respondent's motion to suppress physical evidence seized from an automobile in which she was a passenger.[1]

NAPO is a national non-profit organization, representing state and local law enforcement officers in the United States. It is a coalition of police associations and unions that serves to advance the interests and legal rights of law enforcement officers through advocacy, education, and legislation. NAPO represents 4,000 law enforcement organizations, with over 220,000 sworn law enforcement officers (including police officers, deputy sheriffs, state troopers, highway patrol officers, and traffic enforcement personnel), 3,000 retired officers, and more than 100,000 citizens dedicated to fair and effective crime control and law enforcement. NAPO's affiliate, the National Law Enforcement Officers' Rights Center of the Police Education and Research Project, advocates the fundamental due process and workplace safety rights of officers.

NAPO's members have a significant interest in the important issues of law before this Court and the impact of the Court's decision on law enforcement. First, this case will delineate the extent to which law enforcement officers may conduct "probable cause" searches of automobile passenger compartments, and, specifically, the limitations placed on the scope of such searches. As one of the largest police advocacy organizations, NAPO is concerned with the ability of police officers to conduct effective and thorough searches whenever they have probable cause to search a vehicle for evidence of criminal activity, free of

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[1]Pursuant to Supreme Court Rule 37.6, no counsel for any party in this case authored this *amicus curiae* brief in whole or in part, and no person or entity, other than the *amicus curiae* and its members, made a monetary contribution to the preparation or submission of the brief.

unreasonable, confusing, and unworkable restrictions on what may be searched within the passenger compartment.

Second, this case may decide the restrictions to be placed on searches of a passenger compartment when there is probable cause to arrest, including the strict limitations on what items or containers may be searched, even if they are within the passenger compartment and therefore presumed by law to be within the "reach of the arrestee", the legal principle sanctioned by this Court. The outcome of this case may also bear on whether law enforcement officers can fully protect themselves by conducting searches for weapons upon stopping a motor vehicle, when they have probable cause to both arrest an occupant and conduct a search (the probable cause arising either before or after the stop). NAPO is vitally concerned with the safety of law enforcement officers. Stopping a motor vehicle constitutes one of the least predictable and potentially most dangerous duties of a law enforcement officer.

In summary, NAPO seeks to provide the Court with meaningful insight into the perspective of the police profession, including the absolute need for clarity on the permissible scope of an automobile passenger compartment search.

WRITTEN CONSENT OF THE PARTIES

NAPO has received the written consents of the Petitioner State of Wyoming (from the Deputy Attorney General) and of the Respondent Sandra Houghton (from the State Public Defender), pursuant to Supreme Court Rule 37.3(a). These letters of consent have been filed with the Clerk of the Court, as required by the rule.

STATEMENT OF THE CASE

The *amicus curiae* adopts the factual statement in the State of Wyoming's July 27, 1998, petition for a writ of certiorari. What follows is a shorter narrative of the facts and proceedings.

Early on the morning of July 23, 1995, Wyoming Highway Patrol Officer Delane Baldwin stopped an automobile for speeding and a faulty brake light on an interstate highway. The car contained three occupants, the driver, David Young, and two passengers in the front seat, specifically Young's girlfriend and the Respondent, Sandra Houghton.

While asking for Young's driver's license and other papers, the officer noticed a hypodermic syringe in Young's shirt pocket. He told Young that he had seen the syringe and that he was going to retrieve gloves from the patrol car. Upon returning, the officer ordered Young out of the car and told him to place the syringe on the hood. Another officer kept an eye on the occupants. The officer asked what the syringe was for, and Young responded that he had used the syringe to take drugs. At that point, all the passengers were ordered out of the vehicle, asked to identify themselves, and patted-down for weapons (none were found). The Respondent gave a false name, "Sandra Jones".

Officer Baldwin then began a search of the passenger compartment for drug-related contraband, based on Young's admission that he had used the syringe to inject himself with drugs, constituting probable cause for the search. The officer found a closed lady's purse on the middle of the back seat. He removed a wallet from the purse and located the Respondent's driver's license, identifying her as Sandra Houghton, not Sandra Jones. When the officer asked her about this, she replied, it was "in case things went bad." Around this time, although unclear as to exactly when, the respondent admitted that the purse was hers.

At that point, the officer removed a brown bag from the purse, in which he found a syringe containing approximately 60

cc's of a liquid, which subsequently proved to be methamphetamine (based on an on-site test). He also found more syringes, razor blades and other drug paraphernalia inside the bag. Respondent Houghton apparently denied ownership of these items and others subsequently pulled from her purse. Looking at the Respondent's arms, the officer found fresh needle track marks. The officer then arrested the Respondent. Subsequently, he found a smaller black bag containing more syringes and a vial, which contained more methamphetamine and other drug paraphernalia. Ironically, Young was not arrested, because the small amount of residue left in his syringe would have been more difficult to test for and there was much more evidence against the Respondent.

Respondent Houghton was charged with possession of a controlled substance, a felony. She moved to suppress all evidence seized. After a hearing, the trial court denied her motion and ruled that when an officer has probable cause to believe that contraband is somewhere in a car, as here, he may search the car and any containers within the car which could hold the contraband, including a passenger's purse. Therefore, the evidence was admitted at trial, and she was convicted.

Houghton appealed to the Wyoming Supreme Court on the ground that the search violated her reasonable expectation of privacy in her personal belongings, absent specific probable cause to believe that contraband was in her purse.

On April 3, 1998, the Wyoming Supreme Court rendered an opinion, holding that the search of Respondent's purse violated the Fourth and Fourteenth Amendments of the U.S. Constitution and excluded the evidence seized from it. *Houghton v. State of Wyoming*, 956 P.2d 363 (Wyo. 1998). In its analysis, the court changed the focus of this case from an automobile search to a search of a guest and his or her personal effects on fixed premises. The Court relied upon cases, such as *Ybarra v. Illinois*, 444 U.S. 85, 100 S.Ct. 338 (1979), which analyzed the scope of a search warrant in a residential or commercial building involving a guest

and the guest's personal items in that building.[2] The court adopted a "notice" test, limiting the scope of a permissible search, once a law enforcement officer becomes aware that a container in a vehicle belongs to a passenger. The court concluded, as follows:

> Generally, once probable cause is established to search a vehicle, an officer is entitled to search all containers therein which may contain the object of the search. However, if the officer knows or should know that a container is the personal effect of a passenger who is not suspected of criminal activity, then the container is outside the scope of the search unless someone had the opportunity to conceal the contraband within the personal effect to avoid detection. Here, the officers knew or should have known that the purse did not belong to the driver, but to one of the passengers. Since there was no probable cause to search the passengers' personal effects and no reason to believe that contraband had been placed within the purse, the search was unreasonable and in violation of the Fourth Amendment right to be free from such governmental intrusion. We, therefore, reverse the district court's denial of Houghton's motion to suppress....

956 P.2d at 372.

Two of the five Justices of the Wyoming Supreme Court dissented from this ruling. A petition for a rehearing was denied on April 28, 1998. The State of Wyoming then petitioned the U.S. Supreme Court for a writ of certiorari on July 27, 1998. The Court granted review on September 29, 1998.

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[2]There, the Court ruled that a warrant limited to a search of a tavern and the bartender did not permit a pat-down search of a patron sitting at the bar, since that was beyond the scope of the warrant.

SUMMARY OF THE ARGUMENT

Based on past Supreme Court cases, the automobile exception (to the Fourth Amendment's warrant requirement) allows law enforcement officers having probable cause to believe that contraband may be found in an automobile, to conduct a search of the passenger compartment and all containers *located* therein which may contain the objective of the search, irrespective of *ownership* of the containers. Occupants of automobiles (both drivers and passengers) possess a diminished expectation of privacy in any container, including a woman's purse, left behind by an owner exiting the vehicle. The Wyoming Supreme Court has created a major exception to the principles expounded in this Court's *Carroll*, *Ross*, and *Acevedo* cases, *infra*. It has significantly limited the scope of the search of containers in an automobile to exclude containers or other property not belonging to the driver, by applying a "notice of ownership" test, sometimes applied in cases involving fixed premises but rarely, if ever, applied in automobile cases.

Wyoming's three part "notice" test is confusing and unworkable during the course of lawful searches for contraband in passenger compartments of automobiles. This test does not provide clear and viable guidelines; instead, it requires law enforcement officers to make difficult, if not impossible, determinations concerning which containers and items in a vehicle accurately belong to which person and therefore can be lawfully searched. It will enable those who are committing (or have committed) criminal offenses to easily evade a lawful and reasonable search, and it will curtail effective law enforcement. There is much opportunity for drivers and passengers inside a moving vehicle, either before or during a traffic stop, to transfer an item into a container, to transfer contraband from one container to another container without being detected, or to develop a story of who should claim ownership of a container. In fact, law enforcement officers routinely uncover such efforts when conducting searches for illegal drugs, weapons, and other contraband. The "notice" test thus creates a loophole and will encourage these efforts. Therefore, it is reasonable for a law

enforcement officer having probable cause to search any container found in an automobile's passenger compartment, which conceivably could contain the object of the search, unconstrained by claims of ownership.

Alternatively, whenever a law enforcement officer has probable cause to arrest a driver, which existed in this case, the officer may conduct a search of the passenger compartment, presumed by law to be the area "within the reach" of the individual arrested or to be arrested. The fact that an arrest had not occurred before the search in this case is irrelevant, as long as the officer initially had probable cause to arrest the driver. This is because there is considerable leeway granted as to the timing of an arrest. *Amicus curiae* could find no appellate decisions requiring that containers found within the passenger compartment be the personal property of the individual (usually the driver), as to whom there is probable cause to arrest, before those containers could be searched. The rationale for such a search is to find any weapon which could be used against the officer and prevent the destruction of evidence. The ownership of a container concealing a weapon or evidence is irrelevant to these purposes of officer safety and preventing the destruction of evidence.

Therefore, the three part "notice" test devised by the Wyoming Supreme Court is not required by the Fourth Amendment during lawful searches of passenger compartments, and the Court should reverse that court's decision in this case.

ARGUMENT

I. The three part "notice" test adopted by the Supreme Court of Wyoming for the search of a motor vehicle passenger's personal effects is confusing and unworkable. When a law enforcement officer has lawfully stopped a vehicle, and there is probable cause to search for contraband, it is reasonable under the Fourth Amendment of the U.S. Constitution for the officer to search the vehicle, including any containers or items left in the vehicle that could contain the contraband, without requiring the officer to inquire into or accept independent property claims by either the driver or a passenger.

A. Because of the diminished expectation of privacy that occupants of a motor vehicle possess, it is not unreasonable to search personal property left in the vehicle by either the driver or a passenger, during a lawful search. It is well settled that once a law enforcement officer has probable cause to search an automobile, he or she can search all containers within the passenger compartment.

Under the Fourth Amendment, the reasonableness of a search of an automobile and its driver depends on a balancing between the individual's right of privacy and the public's interest in effective law enforcement. In *Carroll v. United States*, 267 U.S. 132, 45 S.Ct. 280 (1925), this Court established the automobile exception to the general requirement that a warrant be obtained to conduct a search. The Court held that a warrantless search of an automobile, based upon probable cause, did not contravene the Warrant Clause of the Fourth Amendment, in light of an exigency arising out of the likely disappearance of the vehicle. *Id.* at 158. Thus, under *Carroll*, it is permissible for police officers to search an automobile without a warrant when they have probable cause (in other words, reasonable grounds) to believe the vehicle contains weapons or other evidence of a crime. The existence of probable cause to

conduct a search for drugs and drug-related contraband is not disputed in the instant case.

In *Carroll*, this Court observed a major difference between searches involving fixed premises, such as dwellings or other buildings, and searches involving movable structures, such as vessels, wagons, and carriages. 267 U.S. at 151, 45 S.Ct. at 284. Thus, as far back as 1925, the Court recognized a fundamental difference between warrantless searches involving movable vessels (i.e. automobiles) and searches involving fixed premises. Therefore, treating the two exactly the same, as the Wyoming Supreme Court did in the present case by adopting a "notice" test developed for fixed premises, contravenes established precedent and ignores the distinction between automobiles and buildings.

When a passenger in an automobile that is lawfully stopped and searched by the police leaves personal items in the car after he or she is asked to exit the vehicle, that passenger's expectation of privacy in the item left in the automobile is diminished. *Rakas v. Illinois*, 439 U.S. 128, 153-154, 99 S.Ct. 421, 436 (1978). As stated by Justice Powell, in concurrence:

> Nothing is better established in Fourth Amendment jurisprudence than the distinction between one's expectation of privacy in an automobile and one's expectation when in other locations.
>
> . . .
>
> It is unrealistic ... to suggest that these passengers had any reasonable expectation that the car ... would not be searched after they were lawfully stopped and made to get out. The minimal privacy that existed simply is not comparable to that ... of an individual in his place of abode, [citation omitted]; of one who secludes himself in a telephone booth, [citation omitted]; or of the traveler who secures his belongings in a locked suitcase or footlocker. [citation omitted].

439 U.S. at 153-55, 99 S.Ct. at 435-36. As Justice Powell

observed, there are sound reasons for this distinction. Automobiles operate on public streets; they are serviced in public places; they stop frequently; they are usually parked in public places; their interiors are highly visible; and they are subject to extensive regulation and inspection. *Id.* at 154, 99 S.Ct. at 436, n.2.

In the present case, Houghton's act of leaving the purse in the vehicle, when she exited it, demonstrated an "absence of a reasonable expectation of privacy in that purse."[3] *Houghton*, 957 P.2d 363, 373 (dissent Golden, J., with whom Thomas, J. joins). Law enforcement officers will have a difficult, if not impossible, endeavor accurately determining what containers they can lawfully search in an automobile, if a passenger, who leaves behind property in an automobile when he or she exits it, can successfully claim that law enforcement officers had no right to search this property under the Fourth Amendment.

In *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157 (1982), the issue presented was:

> the extent to which police officers--who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it--may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view.

456 U.S. at 800, 102 S.Ct. at 2160. The Court held that the scope of a warrantless search of a vehicle, predicated on the automobile exception, is:

> no broader and no narrower than a magistrate could legitimately authorize by warrant. If probable cause

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[3]The Court can take judicial notice that in American society women almost always keep their purses (or pocketbooks) on them, usually on their shoulders, in their hands, or between their arms, including whenever they exit from an automobile.

> justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.

456 U.S. at 825, 102 S.Ct. at 2173. The Court further stated:

> The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found.

456 U.S. at 824, 102 S.Ct. at 2172.

In *California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991), this Court eliminated the warrant requirement for containers where police have probable cause specific to the container, but not probable cause to search the vehicle generally. Noting the confusion created by the "dual regimes for automobiles searches under Chadwick/Sanders and Ross," the Court interpreted *Carroll* as providing one rule to govern all automobile searches. *Id.* at 580, S.Ct. at 1991. Thus, the Court held that the police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained. *Id.* The Court went further to explain that the interpretation of the *Carroll* doctrine set forth in *Ross* "now applies to all searches of containers found in an automobile. In other words, the police may search without a warrant if their search is supported by probable cause." *Id.* at 579, S.Ct. at 1990.

Thus, based on *Carroll, Ross,* and *Acevedo*, the automobile exception to the Fourth Amendment's warrant requirement allows a law enforcement officer, who has probable cause to believe that the vehicle contains contraband, to search the entire vehicle and all containers therein which may contain the object of the search.

B. The Supreme Court of Wyoming's novel application of the "notice" test, usually applicable to searches of fixed premises, to a search of an automobile, fails to recognize that there is a constitutionally distinguishable difference between the search of a vehicle and a search of fixed premises.

The Wyoming Supreme Court has created a major sub-exception to the automobile exception. In applying the "notice" test to the warrantless search of an automobile, the court has rejected the crucial principle underpinning the automobile exception, by significantly limiting the scope of the search of an automobile to exclude property not belonging to the driver.

Under the general "notice" test, law enforcement officers may assume that all containers on the premises may be searched, unless the officer knows or should know that a container belongs to someone not covered in the warrant or by probable cause. However, if the officer knows or should know the container belongs to a visitor on the property, he or she may search the container if there is independent probable cause to do so (even if the item being searched for, belonging to someone else, could be concealed in the container), or if someone on the premises had an opportunity to hide or conceal contraband in the container immediately prior to the search. *State v. Thomas*, 818 S.W.2d 350 (Tenn. Crim. App. 1991).

It is significant that the *Thomas* case, the key case relied upon by the Wyoming court for the "notice" test, involved a premises search. There, the search warrant was issued for a residence. The court held that the search of the visitor's purse was unreasonable because there was no opportunity for the suspect to place the cocaine in the visitor's purse, because of the fact that both the suspect and visitor were asleep at the time the officers arrived. The court stated:

> [P]olice cannot realistically be expected to avoid searching the property of a mere visitor to the

> premises unless they are aware of its ownership. Absent a requirement of such awareness, the effective execution of a warrant to search a place would be impossible since the police could never be sure that a plausible repository for items named in the warrant belongs to a resident, and hence is searchable, or to a non-resident, and hence is not searchable. Because of this, without notice of some sort of the ownership of a belonging, the police are entitled to assume that all objects within the premises lawfully subject to search under a warrant are a part of those premises for the purpose of executing the warrant....

Id. at 360 (quoting *State v. Naborro*, 525 P.2d 573 (Haw. 1974)).

In applying the "notice" test to the facts of the present case, the Wyoming Supreme Court concluded that the Highway Patrol officer knew or should have known that the purse was not the possession or in the control of the male driver, but was the personal effect of one of the non-suspect female passengers. *Houghton*, 956 P.2d at 370. The court then concluded that, under the "notice" test, the purse was not within the scope of the search of the automobile unless the officer had reason to believe that "someone within the premises has had the opportunity to conceal the contraband within the personal effects of the visitor immediately prior to the execution of the ... [search]." *Id.* (quoting *Thomas*, 818 S.W.2d at 359). Because the officer testified that he did not observe any unusual movements within Young's car, the Wyoming court concluded that there was no effort and thus no opportunity to conceal drugs or drug-related paraphernalia in Houghton's purse. Therefore, the search of the purse was judged not to be within the permissible scope of the search for contraband in the possession or control of the driver. *Id.* at 371.

The Wyoming Supreme Court's expansion of the "notice" test to searches involving automobiles ignores the long established constitutional differences between fixed premises searches and automobile searches and has never been sanctioned by this Court

or any other court in automobile searches. In *Rakas*, this Court stated "[w]e have on numerous occasions pointed out that cars are not to be treated identically with houses or apartments for Fourth Amendment purposes." *Id.* at 148, S.Ct. at 433. In *United States v. Kralik*, 611 F.2d 343 (10th Cir. 1979), cert. denied, 445 U.S. 953, 100 S.Ct. 1603, 63 L.Ed.2d 788 (1980), the court stated, "We do not equate the search of a person unnamed in a warrant with the search of a described automobile for a specified item. A person is not an inanimate container, an automobile is." 611 F.2d at 345.

Thus, by holding that probable cause to search a car generally for contraband is insufficient to search the personal belongings of a passenger for whom there is no individualized probable cause, the Wyoming Supreme Court has, in effect, repudiated the automobile exception doctrine developed in *Carroll, Ross,* and *Acevedo*. It has changed the scope of such a search from a "location" search to a "claim of ownership" search. By failing to acknowledge the difference between automobile searches and other fixed premises searches and by applying the "notice" test, the court has misconstrued and misapplied Fourth Amendment case law.

In summary, applying the "notice" test to situations involving automobile searches would be very alarming, because the driver can easily conceal drugs, weapons, or other incriminating evidence in the purse, bag, or container belonging to the passenger. When law enforcement officers stop a vehicle and have probable cause to search the vehicle, the officers normally have authority to search any purse, bag, or container in the automobile, except now in Wyoming. And this search authority should continue, even if the officer is put on "notice" that a container belongs to a passenger, because of the opportunity of the driver or the passenger to conceal someone else's items in a purse, bag, or another container.

C. Applying the "notice" test to situations where law enforcement officers have lawfully stopped an automobile and have probable cause to search the vehicle will unnecessarily create confusing situations whereby law enforcement officers try to decide, based on assertions by automobile occupants, what items left in the automobile can reasonably be searched. The "notice" test is confusing, unworkable, and thus unreasonable for law enforcement searches for contraband in automobiles. Law enforcement officers need clear and reasonable guidelines in situations involving automobile searches.

In concluding that the *Carroll* doctrine provided one rule to govern all automobile searches and that, as a result, the police could search an automobile and the containers within it where they had probable cause to believe evidence was contained, the Court noted "the virtue of providing 'clear and unequivocal' guidelines to the law enforcement profession." *Acevedo*, 500 U.S. at 576, 111 S.Ct. at 1990. Police need clear guidelines by which they can gauge and regulate their conduct rather than trying to follow a complex set of rules dependent "upon particular facts regarding the time, location and manner of highway stops." *State v. Brown*, 721 P.2d 1357 (Or. Ct. App. 1986). In *Acevedo*, the Court explained the rationale for this principle:

> The line between probable cause to search a vehicle and probable cause to search a package in that vehicle is not always clear .... Recognizing that under Carroll, the "entire vehicle itself ... could be searched without a warrant," we concluded that "prohibiting police from opening immediately a container in which the object of the search is most likely to be found and instead forcing them first to comb the entire vehicle would actually exacerbate the intrusion on privacy interests." [Citation omitted.] At the moment when officers stop an automobile, it may be less than clear

> whether they suspect with a high degree of certainty that the vehicle contains drugs in a bag or simply contains drugs. If the police know that they may open a bag only if they are actually searching the entire car, they may search more extensively than they otherwise would in order to establish the general probable cause required by Ross.

500 U.S. at 574-75, 111 S.Ct. at 1988.

The range of variables in fact situations in search and seizure cases are many. Thus, "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *New York v. Belton*, 453 U.S. 454, 101 S.Ct 2860, 69 L.Ed.2d 768 (1981) (quoting from *Dunaway v. New York*, 442 U.S. 200, 213-214). Thus, under the Fourth Amendment, law enforcement officers need rules that make it possible to reach a correct determination as to whether an invasion of privacy is justified in the interest of law enforcement.

> Fourth Amendment doctrine ... is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."

LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma,* 1974 S.CT. REV. 127, 141.

Application of Wyoming's novel "notice" test to automobile

searches will not give law enforcement officers clear guidelines in conducting such searches. To the contrary, *amicus curiae* NAPO firmly believes that the difficulties, uncertainties, and consequent confusion existing prior to the *Ross* and *Acevedo* decisions would arise again if this Court adopts Wyoming's "notice" test. Adoption of this test would force law enforcement officers, who have lawfully stopped an automobile and have probable cause to search the passenger compartment and any containers located therein, to make quick independent and accurate judgements regarding claims of ownership by either the driver or a passenger of property located inside the vehicle, including ownership of containers and their contents.

The "notice" test creates a loophole to the lawful search of an automobile, by allowing the passenger (or at other times the driver) to claim property which does not belong to him or her. What is a law enforcement officer supposed to do when the officer stops a vehicle and has probable cause to search the vehicle and the containers therein, but the passenger claims ownership of a bag situated on the back seat? The officer in this situation is faced with the following questions, among others: Whose bag is it? Is the passenger telling the truth? Can the officer still lawfully search the bag? If the driver is a male and the passenger a female, must the officer make a determination as to whether a "purse-like" bag is more likely to belong to a male or a female, before searching it?[4]

In *State v. Fix*, 730 P.2d 601 (Or. Ct. App. 1986), the police investigated a complaint that two men armed with pistols had threatened another man. An officer stopped a blue pickup truck which matched the suspect vehicle's description and was occupied by two males and two females. During the course of searching the

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[4]In today's society, one could easily argue that it is not unreasonable to conclude that a male would own a "purse-like" bag, especially someone hoping to evade a law enforcement search for contraband. Also, European men have carried special men's purses since the 1970s. Also, both men and women have found it fashionable to use "fanny packs", bags that are strapped around one's waist.

vehicle, the officer found a purse on the passenger side floorboard, which contained a loaded .38 special pistol. The court held that the officer had probable cause to believe that the two male passengers had committed a crime and that evidence of that crime (the guns) would be in the truck. *Id.* at 604. In addition, the court concluded that the search of the purse was lawful because the purse was large enough to contain a gun. *Id.* If the Oregon court had followed the Wyoming "notice" test, the search of the purse would have been unlawful, because the officer should have known that the purse did not belong to either male passenger.

In *State v. Moore*, 619 So.2d 376 (Fla. Dist. Ct. App. 1993), a police officer stopped a vehicle that contained a male driver and a female passenger. During the course of a lawful search of the vehicle, the officer found three "purse-like" bags on the front floorboard of the vehicle. Upon opening the bags, the officer discovered contraband in all three bags, which belonged to the female passenger. The court upheld the officer's search of the vehicle and the passenger's purse. *Id.* at 377. Under the Wyoming "notice" test, it is uncertain whether the officer would have been allowed under the Fourth Amendment to search the "purse-like" bags, because conceivably either the male driver or the female passenger could have owned the bags.

In *People v. McMillon*, 892 P.2d 879 (Colo. 1995), a police officer lawfully stopped a vehicle. The driver and passenger were both females. The officer noticed a syringe between the driver's seat and the console between the seats. During a search of the vehicle, the officer noticed two purses, one lying on the passenger seat and the other lying on the floorboard of the front passenger area. The officer searched the purse lying on the seat and found drugs inside of it. The officer testified that he did not have any reason to know which purse belonged to which person. *Id.* at 881. The Colorado Supreme Court held that the officer had probable cause to perform a search of the car for contraband, and that neither *Ross* nor *Acevedo* required a separate probable cause determination for the passenger's purse. *Id.* at 883. The Court stated, "The search of the purse was proper irrespective of whether the officer

knew or should have known that it belonged to McMillon". *Id.*

If the "notice" test was the standard applied in Colorado for all automobile searches, it is unclear what the officer in *McMillon* would and could have done. There were two female occupants in the car, and the officer found two purses inside the automobile. Which purse is the officer allowed to search under the automobile exception? How does the officer decide which purse belongs to which female? Should he ask the women which purse belongs to which person? Will they tell the truth? What if the passenger claims to own both purses? What does the officer do then? Does the officer give up and not conduct a search, when faced with either a possible exclusion of the evidence in a future prosecution because of this confusion or a possible § 1983 Federal civil rights action, or both; or does the officer carry out his or her duty to enforce the laws and conduct a search based on probable cause, disregarding these risks?

The confusion is manifest. The notice test is confusing and unworkable in the context of automobile searches and is not mandated by the Fourth Amendment's reasonableness requirement.

In the present case, the Supreme Court of Wyoming determined that there was no reason to believe that drugs could have been place in Houghton's purse prior to the stop.

> The officer testified that he used his lights to illuminate the inside of the car at all times, and that there were no "unusual movements or sudden movements within the vehicle itself." He also testified that the occupants were constantly under his observation or that of another officer. The officer's testimony clearly established that there was no reason to believe the object of the search was placed in the purse prior to the stop, no probable cause to believe that either woman was carrying drugs, and no reason to believe that the purse belonged to Young.

956 P.2d at 371.

This conclusion utterly disregards the ease with which items can be concealed, especially if a purse or container had been in the front seat, or if the driver had asked the passenger to conceal the contraband beforehand, as is a common practice in these cases. The Wyoming court below payed short shrift to the possibility that the Respondent may have concealed the driver's contraband in her purse. As the dissent points out:

> Common sense tells us that the transfer of small containers of controlled substances between an automobile's occupants can occur swiftly, silently, effortlessly, and without detection by even the keenest observer.

956 P.2d at 373 (Dissent, Golden, J., with whom Thomas, J., joins). In fact, as most law enforcement officers would confirm, it is very common for automobile drivers who possess a weapon or an illegal substance to ask an occupant in the vehicle to conceal or hide it at any time--before, during, or just after a traffic stop.

In conclusion, the three part "notice" test applied to vehicle searches is confusing, unreasonable, and unworkable.

First, if this Court affirms the Wyoming decision, then many drivers committing criminal acts will easily be able to evade searches by having a passenger present in a car, by concealing items in purses or other containers, and by having the passenger lay claim to such containers prior to a search. It will thus enable those against whom there is probable cause to easily evade a lawful and reasonable search, seriously curtailing effective law enforcement.

Second, this test should not be applied to searches pursuant to the automobile exception, because it requires law enforcement officers to make impossible determinations concerning which items in a vehicle really belong to which person and therefore can be plausibly searched. Under the precedents of this Court and in view

of the public interest in effective law enforcement, it is reasonable for the law enforcement officer to search any container which conceivably could contain the object of the search. In summary, the decision by the Wyoming Supreme Court is not compelled by the Fourth Amendment.

II. As an alternative ground, the Court should uphold the search of the Respondent's purse, as a search of a vehicular passenger compartment incident to an arrest, where there was probable cause to arrest the driver of this vehicle for possession of controlled substances. The crucial element conferring upon law enforcement officers the right to conduct a search incident to an arrest is probable cause to arrest, not the actual arrest itself which may occur after the search.

A. As long as a law enforcement officer has probable cause to arrest, it does not matter whether the arrest occurs after or before the search incident to an arrest.

Once probable cause to arrest has been established, the authority to conduct a search incident to a lawful arrest has been consistently upheld, in order to secure officer safety or prevent the destruction or concealment of evidence. *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034 (1969).

It is the probable cause to arrest, not the actual arrest itself, that justifies the search incident to arrest. Consequently, the timing of the actual arrest has not been considered to be significant, and the courts often have granted law enforcement officers considerable leeway in deciding upon the best procedure of arrest. In *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556 (1980), this Court stated:

> Once petitioner admitted ownership of the sizable quantity of drugs found in Cox's purse, the police clearly had probable cause to place petitioner under arrest. Where the formal arrest followed quickly on

> the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.

448 U.S. at 111. Likewise, in *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889 (1968), in a concurring opinion, Justice Harlan stated that once probable cause to arrest is established:

> There is no case in which the defendant may validly say, "Although the officer had a right to arrest me at the moment when he seized me ... the search is invalid because he did not in fact arrest me until afterwards."

392 U.S. at 77.

In this case, after Highway Patrol Officer Baldwin saw the hypodermic syringe plainly visible in David Young's left front pocket, the officer clearly had probable cause to arrest Young when he admitted that the syringe was used to take drugs. At this point, the officer's search of the vehicle and property therein, including the Respondent's purse, was valid as a search incident to an arrest. The fact that Young was not formally arrested after the search, due to what was discovered in the Respondent's purse, is of no practical consequence. Also, the arrest of Respondent Houghton, because of the greater evidence against her, is irrelevant, because of the probable cause to arrest the driver.

Accordingly, this Court should uphold the search of Respondent's purse, as a search of a passenger compartment incident to an arrest, where there was probable cause to arrest the driver of this vehicle for possession of a controlled substance.

B. When conducting a search incident to an arrest, the law enforcement officer may validly search the belongings of a passenger, as long as the belongings are in the passenger compartment of the vehicle when the search is made.

In *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860 (1981), the Court held that when an officer makes a lawful custodial arrest of a motor vehicle occupant, he or she may, contemporaneously with the arrest, search the passenger compartment of the vehicle, including containers therein. Any container found within the passenger compartment could be searched whether it was opened or closed, "since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have." 453 U.S. at 461, 101 S.Ct. at 2864. In sum, it is the arrest based on probable cause that justifies the intrusion, not the existence of probable cause to search. "[A] search incident to the arrest requires no additional justification." *United States v. Robinson*, 414 U.S. 218, 235, 94 S.Ct. 467, 476.

A case on point is *People v. Mitchell*, 42 Cal. Rptr. 2d 537 (Cal. Ct. App. 1995). There, the court held that a search of a passenger's purse, incident to an arrest of the driver, was legally justified even though the officer knew at the time of the search that the purse did not belong to the driver. In that case, the police officer, after arresting the driver for driving with a suspended license, searched the vehicle and its contents, including the defendant's purse which he found on the floorboard in front of the passenger seat. The court relied on *Belton* for the proposition that, "the arrestee's immediate control always includes the passenger compartment and its containers." *Id.* at 538. The court indicated that nothing in *Chimel* or *Belton* required that containers within the reach of the person arrested, which are searched, must themselves be his or her personal property. *Id.* at 539.

In *Staten v. U.S.*, 562 A.2d 90 (D.C. 1989), the defendant was a passenger in his own car. After arresting the driver for

driving under the influence of alcohol, the police searched the vehicle and found a loaded gun in the glove compartment, that turned out to belong to the defendant. In finding that the search of the glove compartment was lawful, the court stated:

> In circumstances where the police stop a vehicle with multiple passengers and arrest one of them, the need for the police to discover either hidden weapons which could be turned upon them or evidence which could be destroyed is no less acute simply because a person other than the arrestee owns the "container" in which those items might be located. In fact, because of the number of people involved, the need may be greater. Third-party ownership of ... "containers" therein would not necessarily prevent the arrestee from gaining access to those items. It should not, therefore, bar the police from searching them in the same manner as if they were owned by the arrestee.

Id. at 92.

According to *Belton, Mitchell,* and *Staten,* when a law enforcement officer conducts a lawful search of a vehicle incident to an arrest, the officer, in order to discover weapons and contraband, can search any item, container, or bag that is within the passenger compartment since they are presumed to be "within the reach" of the arrestee.

Clearly, the issue is one of location, not possession. It is not only the driver's property that is within his immediate control but anybody's property, as long as the property is located in the passenger compartment. Therefore, in the present case, when the Highway Patrol officer had lawfully stopped the automobile containing Young, Young's girlfriend, and the Respondent, and when the officer had probable cause to arrest Young after he admitted that the syringe in his pocket was used to take drugs, it was reasonable for the patrol officer to search the passenger compartment and any containers located within it, looking for both

weapons and evidence, regardless of whether or not the driver owned every container.

C. Law enforcement officer safety is a major reason for allowing searches of persons and passenger compartments incident to an arrest. Respondent's purse could have concealed a gun, as well as contraband, and therefore the search was reasonable under the Fourth Amendment.

Today, traffic stops are one of the riskiest tasks for law enforcement officers and pose a significant threat to their physical safety. Each traffic stop presents a situation where an officer must confront individuals unknown to him or her, who may be hiding weapons or concealing evidence anywhere on themselves or in the passenger compartment of the stopped vehicle, including in purses and other personal property. Since the advent of the automobile, approximately 300 law enforcement officers are known to have died during traffic stops, and approximately 80 percent (or 240) of these were shot to death.[5] From 1987 through 1996, there were 90 law enforcement officers feloniously killed during traffic stops and pursuits. For the same ten year period ending in 1996, there were 4,333 law enforcement officers assaulted through use of weapons during traffic stops and pursuits.[6]

This court has recognized that law enforcement officer safety during a vehicle stop is a crucial "public interest" factor in analyzing the reasonableness of searches and seizures of vehicles and their occupants under the Fourth Amendment. *Maryland v.*

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[5]Craig W. Floyd, *For Law Enforcement Officers, Traffic Stops Are Fraught with Danger*, AMERICAN POLICE BEAT, Mar. 1998, at 36. (This article discusses a number of the more egregious episodes of violence against law enforcement officers during traffic stops.)

[6]FBI UNIFORM CRIME REPORTS, U.S. DEPARTMENT OF JUSTICE, *Law Enforcement Officers Killed and Assaulted in 1996*, at 27 and 69, <http://www.fbi.gov.ucr/killassl.htm>.

Wilson, 519 U.S. 408, 117 S.Ct. 882 (1997). In citing statistics on officer assaults and deaths, the Court stated, "Regrettably, traffic stops may be dangerous encounters." *Id.* at 885.

In order to protect themselves, law enforcement officers must be able to conduct searches of the driver and the immediate surrounding area, as long as there is probable cause to make an arrest. The rationale for such searches was set forth in *Chimel*, where the Court stated, "[o]therwise, the officer's safety might well be endangered, and the arrest itself frustrated." 395 U.S. at 763, 89 S.Ct. at 2040. Accordingly, under *Belton* and *Rawlings*, *supra*, an officer may search a passenger compartment (and containers therein) for weapons during a lawful stop of a vehicle where there is probable cause for an arrest.

In *McMillon*, *supra*, the Colorado case factually similar to the present one, a police officer lawfully stopped a vehicle for a traffic offense, arrested the driver on an outstanding warrant related to drugs, directed the passenger to step out of the vehicle, searched the automobile both on probable-cause (for contraband) and on incident-to-arrest grounds, and found cocaine in the passenger's purse which the officer found behind the seat. When asked by the prosecutor if identification was the only thing he was looking for in the purse, the officer replied "no, I was also looking for weapons. I didn't want to hand [the defendant] her purse with a gun or a knife in it." 892 P.2d. at 881.[7]

In determining the reasonableness of the search of Young's vehicle in this case, as one incident to an arrest (where there was probable cause for such), the crucial "public interest" factor is law enforcement officer safety. If Young had been actually arrested prior to initiation of the search, then clearly the Wyoming Supreme

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[7]However, to look for weapons (as well as concealed evidence), the officer need not subjectively fear any occupant of the vehicle (including the driver) or need not believe that an occupant is armed, as long as the officer has probable cause to arrest the occupant. *Gustafson v. Florida*, 414 U.S. 260, 94 S.Ct. 488 (1973).

Court would have been obligated by the *Belton* and *Rawlings* decisions to uphold the search of Houghton's purse as incident to Young's arrest. However, because this search was based on probable cause to search the car generally, the Wyoming court struck down the search.

This result is illogical and makes little, if any, sense, especially in light of the probable cause to arrest Young and the clear justification for the search of the passenger compartment and Respondent's purse on that ground alone. It is quite conceivable that, although Young had not yet been formally arrested, the Respondent's purse or another container in the car could have concealed a weapon, which could have been used against the officer. Accordingly, the search and seizure of Respondent's purse is reasonable on the ground of officer safety under this Court's *Belton, Chimel, Wilson,* and *Rawlings* decisions.

CONCLUSION

For the foregoing reasons, *amicus curiae* National Association of Police Organizations urges the Court to validate the reasonableness of the search of the passenger compartment and the containers therein, including the Respondent's purse, either on the ground that there was probable cause to conduct such a search, or, alternatively, on the ground that the search was incident to an arrest of the driver, based on probable cause to arrest, although a formal arrest had not yet occurred.

Affirming the decision of the Wyoming Supreme Court in this case would create an unreasonable, confusing, and unworkable rule for law enforcement officers conducting searches of passenger compartments and their contents. It would give a green signal to those committing crimes to bring along a passenger and to have the passenger claim ownership of containers in the vehicle to prevent officer searches for evidence or weapons, thereby endangering law enforcement officers and crippling their reasonable efforts at effective crime control.

Therefore, *amicus curiae* respectfully requests that the Court reverse the judgment in this case of the Supreme Court of the State of Wyoming.

Respectfully submitted this 9th day of November, 1998.

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